RESPONSE REQUESTED

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SUPREME COURT, U.S.

NO. 90-1134

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF MISSOURI,

Petitioner,

vs.

DAVID URBAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

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QUESTIONS PRESENTED

I.

WHETHER THE MISSOURI SUPREME COURT MISAPPLIED GRADY V. CORBIN TO THE FACTS OF THE INSTANT CASE.

II.

WHETHER THIS COURT MISCONSTRUED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN GRADY V. CORBIN.

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STATEMENT OF THE CASE

Respondent does not dispute any facts as set forth by Petitioner in the Statement of the Case. Respondent does add the following pertinent facts.

At the first trial, Respondent was charged with felony child abuse by photographing a child engaged in the simulation of a sexual act, to-wit, touching Patsy Urban's vaginal area (§568.060 RSMo. 1986); and with promoting child pornography by photographing child pornography consisting of touching the breasts of Patsy Urban (§573.025 RSMo. 1986). The jury was effectively charged as follows: To find Respondent guilty of Count I, child abuse, the jury would have to find Respondent guilty of photographing a child engaged in the touching of Patsy Urban's vaginal area. To find Respondent guilty of Count II, promoting child pornography, the jury would have to find Respondent guilty of photographing child pornography which consists of touching the breasts of Patsy Urban. The jury was also effectively instructed that pornography is defined under Missouri law as material or performance depicting sexual conduct or sexual contact, sexual contact being any touching of, among other things, the breasts of a female person for the purpose of arousing or gratifying sexual desire. (§573.025, 573.010 RSMo. 1986).

In support of Counts I and II, the state admitted into evidence at the first trial two rolls of film, the photographs from which totaled forty-eight in number. The photographs

became state's exhibits 10A through 10X and 12A through 12X, respective to each roll. Of the forty-eight photographs, twelve were shots of the outside of Respondent's home or were standard poses of the grandchild fully dressed and seated on a couch. Of the remaining thirty-six photographs, thirty-two showed the child playing on or near his grandmother's lap and because Patsy Urban was nude the photographs depicted her breasts. One photograph showed the child reaching for a ball between Patsy Urban's legs. And three photographs showed the child alone nude in standard pose.

Following the jury trial at which time Respondent was convicted of Count I and acquitted of Count II, Respondent filed a Motion for Judgment of Acquittal, arguing that the evidence was insufficient to sustain the verdict and that the charge did not state a cause of action. He also filed a Motion for New Trial. Although the court denied the Motion for Judgment of Acquittal and granted a new trial, the trial judge stated that the new trial was conditional upon the state filing a proper new information, one that either stated an offense or one which the evidence could support. In fact, what the court did was effectively to grant a conditional dismissal. However, within five days the state filed a new information and again proceeded to trial.

The new information charged Respondent with one count of felony child abuse, alleging that Respondent knowingly photographed a child "engaging in nudity depicted for the purpose of sexual stimulation or gratification of any

individual who may view such depiction." The trial was jury-waived and was based on a stipulated set of facts, a partial transcript from the first trial, and the same set of forty-eight photographs which was again put in evidence over objection. On the basis of the transcript and the forty-eight photographs, the trial judge found Respondent guilty of the charge.

The forty-eight photographs were taken at one time as part of one "photo-shoot" right before Patsy Urban was going to give the child a bath. Specifically, Respondent who was a commercial photographer came home after a photo-shoot and found his wife resting on the couch and his grandson playing. They were both undressed because Patsy Urban was going to give the child a bath before sending him home as requested by his mother. Because Patsy Urban customarily got wet when bathing the child, due to his splashing about, she decided to undress before bathing him this time. Respondent had film remaining in his camera and shot two rolls of film of his wife and grandson because he thought they were "beautiful." Although he had a dark room in his basement, he took the film to K-Mart for developing because it was more convenient.

For the court's reference, the photographs can be found attached to the decision of the Missouri Court of Appeal, No. WD-40852, which is part of the record.

SUMMARY OF THE ARGUMENT

In the recent case of Grady v. Corbin, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), this Court held that the Double Jeopardy Clause of the Fifth Amendment is violated if, to establish an essential element of an offense charged in a subsequent prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. The Missouri Supreme Court applied that standard to the instant case, and properly found that the subsequent prosecution was barred by Grady.

The Missouri Supreme Court's holding was based on a finding, supported by the facts, that Count II in the first trial (promoting child pornography), for which Respondent had been acquitted, depended on identical conduct as that charged in the single count at the second trial. Specifically, the court held that the state presented multiple charges, in different proceedings, all based on photographs taken and developed together. Because it was Respondent's conduct which was on trial, and not what the photographs themselves depicted, Grady barred the second trial.

Although the Missouri Supreme Court decision stopped with the above assessment, it is clear that Grady and other U.S. cases barred re-prosecution for other reasons as well. Even if one looked beyond the conduct of the photographer, to the photographs themselves, federal law still requires reversal. Although Petitioner argues that Grady is an anomaly, and should be set aside by this Court because it conflicts with other

Supreme Court precedent, is unwieldy in its implementation, or is a decision that simply comes out of left field - it is obvious that this is not the case. Grady is grounded firmly in Brown v. Ohio, 432 U.S. 161 (1977), which held that "successive prosecutions will be barred in some circumstances where the second prosecution requires the re-litigation of factual issues already resolved by the first." Brown, supra at 166-167 n6. Count II in the first trial resolved the factual issue of whether the "breast" photographs were taken for the purpose of "arousing or gratifying sexual desire." The second trial re-litigated this exact claim in asking whether the same set of photographs (32 of which focused on breasts and one of which focused on the vagina) were taken for purposes of sexually stimulating or gratifying the viewer. Regardless of whether the focus is on the clicking of the camera shutter or on the nature of the photographs, Grady bars the subsequent prosecution. As this is not a case where a state supreme court has decided a federal question in a way that conflicts with applicable Supreme Court precedent, the petition should be denied.

ARGUMENT

INTRODUCTION

The issuance of a Writ of Certiorari is not a right but a matter of judicial discretion. S.Ct. Rule 10.1. Although the Supreme Court may review a judgment of a state supreme court based on a federal question, when the lower court has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court, S.Ct. Rule 10.1(c), this criterion is strictly limited and narrowly invoked. Certiorari will be granted "only when there are special and important questions therefor", Rice v. Sioux City Memorial Park Cemetery Inc., 349 U.S. 70 (1954), and only in cases involving principles the settlement of which is important to the public as distinguished from the parties. Rice, supra; NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951). Evidentiary findings will not be disturbed unless plainly without support, General Talking Pictures, supra, and constitutional issues will not be taken up unless avoidance becomes evasion. Rice, supra. Thus, the primary questions with which this brief is concerned are as follows:

I. Did the Missouri Supreme Court misconstrue Grady or misapply it to the facts of this case?

II. Is this a case of special importance such that certiorari should be granted?

The answer to both questions is in the negative. Grady was correctly read and applied by the state supreme court in this case, and in fact, had the state court chosen to go further, it could have found other U.S. Supreme Court law as

underpinning to its decision. Moreover, Grady, logically forged as it is from precedent, needs no re-visiting by this Court. Petitioner, in an effort to entice this Court with its petition, dramatizes the reach and effect of this matter and in so doing misrepresents its significance. This is an "episodic" case, Rice, supra, one where a state supreme court has merely construed and invoked United States law in its sound judicial discretion. The matter lies between the parties, and its settlement is important there, as distinguished from any special importance to the public. For the reasons more fully explained below, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

I.

WHETHER THE MISSOURI SUPREME COURT MISAPPLIED GRADY TO THE FACTS OF THE INSTANT CASE.

In Corbin v. Grady, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) the Court went a step beyond its earlier decisions, extending the reach of the Double Jeopardy Clause of the Fifth Amendment beyond "offenses" for which one is twice put in jeopardy to "conduct" for which one is twice put in jeopardy. Grady represents no radical departure from prior law, nor does it truly fabricate a new test. It merely holds that subsequent prosecution is barred if, "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S.Ct. at 2087. Grady places the focus of the inquiry not on the statutory elements of the successively charged allegations, but on the conduct which was prosecuted. "The critical inquiry is what conduct the state will prove, not the evidence the state will use to prove the conduct." Grady, 110 S.Ct. at 2093. The effect of this expanded inquiry is to preclude the state from "avoid[ing] the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct." Id. The effect is also to implement significant Court policy, e.g, precluding the state the opportunity to rehearse its presentation of proof, and protecting a defendant from the anxiety of multiple trials.

One can see the genesis of Grady by looking at its facts and comparing it to the facts of its predecessor cases. One can also see, by engaging in this review, that the facts of the instant case come squarely within Grady.

In Grady, the defendant crossed the double yellow line, struck two cars, and killed an occupant of one of the cars and injured another. He was cited with misdemeanor driving while intoxicated and with failing to keep to the right. He subsequently pled guilty to the traffic tickets. Sometime thereafter, he was indicted by a grand jury for reckless manslaughter, vehicular manslaughter, negligent homicide and assault. Defendant sought a writ of prohibition barring prosecution on the indictment.

A week after the indictment was issued, the state filed a bill of particulars, wherein it stated that its proof at trial would consist of the following facts: (1) Defendant operated a motor vehicle in an intoxicated condition; (2) Defendant failed to keep to the right; and (3) Defendant exceeded safe speed under the road and weather conditions, all resulting in injury or death to the car occupants.

Thus, the state admitted that it would be proving its case by re-proving the entire conduct for which the defendant had previously been convicted - the DUI and the crossing-over charges. This, said the Supreme Court, is what the Double Jeopardy Clause prohibits. According to the Court, to prove the entirety of the conduct for which the defendant had been

convicted, in order to establish essential elements of the homicide and assault offenses, would result in double jeopardy.

The Court found authority for this reasoning in its earlier case of Illinois v. Vitale, 447 U.S. 410 (1980). In that case, the defendant likewise caused a fatal traffic accident. He was cited at the scene with failure to reduce speed to avoid an accident. He pled guilty to this infraction and was then charged with involuntary manslaughter based on his reckless driving.

Relying on the old Blockburger test, the Court there held that the defendant's subsequent trial was not barred by the Double Jeopardy Clause, the reason being that Blockburger did not bar a second prosecution if each offense required proof of a fact which the other did not. Blockburger v. United States, 284 U.S. 299 (1932). Because in Vitale, involuntary manslaughter required proof of a death but failure to reduce speed did not, and because failure to reduce speed was not a statutory element of involuntary manslaughter, the case survived a double jeopardy challenge. However, the Court went on to say there, that,

> It may be that to sustain its manslaughter case, the state may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede that prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown [v. Ohio 432 U.S. 161 (1977)] and our later decision in Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977).

Vitale, supra at 420.

In the instant case, Respondent, David Urban, had already been acquitted for conduct that was a necessary element of the crime charged at his second trial. As the Grady holding and the Vitale dictum make clear, this constitutes double jeopardy.

At his first trial, Respondent was acquitted of Count II which charged him with promoting child pornography. Specifically, Respondent was found not guilty of photographing child pornography consisting of touching the breasts of Patsy Urban for the purpose of arousing or gratifying sexual desire of any person. In other words, the jury was asked whether Respondent's act of photographing the child touching his grandmother's breasts was for the purpose of titillation. The jury considered this act or conduct, and determined in the negative.

At the second trial, Respondent was charged with photographing a child engaging in nudity depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction. In other words, the question again was whether Respondent's act of taking the photographs was for the purpose of titillation. Because it was his conduct which was on trial in the first instance, the state was barred from trying Respondent again for this same conduct. Just as in Grady, where the state was seeking to "prove the entirety of the conduct for which Corbin had already been

convicted[1] to establish essential elements of the homicide and assault offense", Grady, 110 S.Ct. at 2094, the state in the instant case, by necessity, had to and did re-prove previously litigated conduct in order to make its case in the second trial.

In its Petition, the state claims that it was not the conduct of taking the photographs for which Respondent was retried, and on this Petitioner is half correct. An act of taking photographs in and of itself violates no law, but must be coupled with photographs which evoke images designed to sexually arouse. However, the fact still remains that the taking of the photographs is an element of both offenses - that charged in Count II of the first trial and that recharged at the second trial. Thus, the state could not conceivably prove its second case without reproving the conduct of the taking of the photographs. This violates Grady, because "the prosecution sought to establish an essential element of the second crime by proving conduct for which the defendant was [acquitted] in the first prosecution." Grady, 110 S.Ct. at 2087.

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[1] It is of no import that the defendant in Grady had been previously convicted, and the Respondent in our case has been previously acquitted. The Double Jeopardy Clause embodies three protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Grady, 110 S.Ct. at 2090.

Looked at another way, Respondent was put on trial the first time for the following conduct: Respondent was a photographer who came home, found his wife and grandson in a state of undress, took two rolls of film consisting of 36 "sexual" photographs, 32 of which showed the child playing with or focused near Patsy Urban's breasts, one of which showed the child reaching for a ball near Patsy Urban's vagina and 3 of which showed the child in an innocuous nude pose alone, and then that Respondent had the film commercially developed. In the second trial, Respondent was put on trial for identical conduct. The only difference there was that the trier of fact was asked whether the photographs depicted nudity in order to titillate, rather than specifically breasts. This is not a distinction which Grady embraces, nor should it: to allow the state to re-try Respondent by dressing up the charge and changing one or two words would be to thwart the concerns this Court has consistently shown in invoking double jeopardy considerations. The due process concerns inherent in the Double Jeopardy Clause cannot be skirted by such a disingenuous slight-of-hand. To quote this Court in Grady: "These cases all recognized that a technical comparison of the elements of the two offenses as required by Blockburger does not protect defendants sufficiently from the burdens of multiple trials." Grady, 110 S.Ct. at 2093.

Thus, it is not the scenes depicted in the photographs which are at issue, but the conduct (and intent) in taking the photographs which is the gravamen of the test. And the

conduct, at issue in trial I and at issue in trial II, was and is identical. Once Respondent had been prosecuted for taking the photographs he could not again be re-tried for this act. He was in fact re-tried for this act, however, and by necessity had to be; the state could not have proven its case at the second trial by leaving out the essential element of "photographing."

Because the Missouri Supreme Court properly found that the instant case falls squarely within Grady, the inquiry should stop here. However, because the state so strenuously denounces Grady, in this or any context, Respondent offers as additional argument set forth below, why the Missouri Supreme Court's decision should be left undisturbed.

As stated by the Court in Grady, Blockburger (barring re-prosecution if the offenses have identical statutory elements or one is a lesser-included offense of the other) is not the only test historically relied on to vindicate the Double Jeopardy Clause's protection against multiple prosecutions. Brown v. Ohio, supra at 166, 167 n6, noted that "successive prosecutions will be barred in some circumstances where the second prosecution requires the re-litigation of factual issues already resolved by the first." A related bar comes into play when an issue of ultimate fact has once been determined by a valid and final judgment; under these circumstances, the state is collaterally estopped from again litigating the same issue between the same parties. Ashe v. Swenson, 397 U.S. 436 (1970).

In the case at hand, the first trial laid to rest the factual question of whether the photographs depicting the child touching Patsy Urban's breasts constituted child pornography, i.e., material the purpose of which is to "sexually arouse". Not satisfied that these photographs simply didn't signify pornography in the minds of the jurors, the state re-submitted the identical photographs at the second trial, and asked the court to find them unlawful because they were intended for purposes of "sexual stimulation." No one is quibbling here that arousal and stimulation are not synonymous. Thus, what the state in fact did was to re-try the question of the nature of the photographs themselves. The only difference was that the second time, the state asked whether it was the nudity that created the arousal or stimulation, rather than the touching of the breasts. Considering that almost all of the photographs admitted both times into evidence were "breast touching" photographs - with only 4 involving mere nudity without juxtaposition to the breasts - the state was estopped from asking the court at the second trial to re-judge the set of photographs. Perhaps had the state at the second trial merely admitted the four "non-breasts" photographs [2] and asked whether

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[2]Actually, the state would have had to exclude the one photograph of the child reaching toward Patsy Urban's vagina. This photograph had been the subject of the litigation of Count I at the first trial, and should not have been the subject of the amended charge at the second trial. Thus, had the state proceeded properly, consistent with both the rule against double jeopardy and the rule of collateral estoppel, it would

(Footnote Continued)

they constituted child abuse, it would not have offended the rule of collateral estoppel embodied in the Fifth Amendment. However, just as in Ashe, where one could rationally conclude only that the jury grounded its verdict on the very issue which the state later sought to re-litigate - one can only conclude here that the court, in arriving at its verdict, based its conclusion of child abuse on the totality of the photographs, including the breast photographs which had previously been characterized as non-pornographic.

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of the 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine a record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon a issue other than that which the defendant seeks to foreclose from consideration... When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Ashe, supra at 443-44.

Indeed, the slight-of-hand practiced by the prosecutor in this case is not all that different from that practiced by the

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(Footnote Continued)
have relied only on 3 photographs at the second trial, these being of the child merely standing nude and having his picture taken. The state, having more sense than to hope to convince a judge that these photographs constituted child abuse, did the only thing left available; it admitted all the photographs previously viewed, considered, and litigated by the jury at the first trial.

prosecutor in Brown. In that case, defendant was convicted of joy-riding for operating a vehicle without the owner's consent. In fact, his non-consensual use of the car extended over a nine-day period of time. The state later charged him with car theft for that same taking. The state supreme court upheld the subsequent conviction, reasoning that the theft charge was focused on a different part of the nine-day joy-ride and thus did not constitute double jeopardy. The Supreme Court reversed, holding that "the Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Brown, supra at 169. That in effect is what the prosecutor attempted to do upon re-trial in this case. Indeed, when Respondent came home and found his wife and grandson readied for a bath, he simply began to click away until his film was spent. The photographs represent a sequence of natural poses captured as the child and Patsy Urban move from the couch to the floor. In other words, the pictures tell a story in time. In taking this singular and discreet set of photographs and dividing them into separate offenses is tantamount to taking a "single crime" and dividing it into "a series of spatial units". Such conduct on the part of the prosecutor can never be encouraged or condoned.

For the above stated reasons, the Missouri Supreme Court was correct in its holding that Respondent's second trial was barred by the Fifth Amendment to the Constitution. Because the decision does not conflict with applicable decisions of this

Court, but in fact falls within an entire line of cases elucidating the Double Jeopardy Clause, Petitioner's Writ of Certiorari should be denied.

II.

WHETHER THIS COURT MISCONSTRUED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN GRADY V. CORBIN.

Petitioner complains mightily that Grady v. Corbin "signifies a radical departure for this Court in interpreting the Double Jeopardy Clause of the Fifth Amendment," (Petitioner's Brief at page 13). Petitioner also claims that if the Missouri Supreme Court's interpretation of Grady were to be universally adopted, the effect would be a requirement that all charges against a defendant growing out of a single transaction be tried in one proceeding - an approach, says the state, that this Court has steadfastly rejected. The state is wrong on both points.

As argued above, Grady is not a "radical departure" but is grounded firmly in the pointed dictum of Illinois v. Vitale, supra. It is also the next logical step in a long line of cases evolving in response to this Court's efforts to give real meaning to a complex due process issue. Indeed, over the years this Court and others have found that the problems of multiple prosecutions - be they same offense, same transaction, same evidence, or same conduct - come in almost an infinite number of permutations. Moreover, this court has consistently risen to the occasion, developing in response to each new type of divided or multiple prosecution a body of law which strives to both protect the defendant and invoke the literal meaning of the Double Jeopardy Clause itself.

In Justice Brennan's concurring opinion in Ashe v. Swenson, joined in by Justices Douglas and Marshall, and

reiterated seven years later in Harris v. Oklahoma, he discusses the idea of trying all charges once which grow out of a single transaction - an idea which seems anathema to Petitioner. Instead of recoiling at this notion, Justice Brennan embraces it and has no doubt that its authority is found in the Constitution itself.

> In my view the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction. This "same transaction" test not only enforces the ancient prohibition against vexacious multiple prosecutions embodied in the Double Jeopardy Clause but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of the single transaction or occurrence best promotes justice, economy and convenience. Ashe, supra at 453-54.

Justice Brennan was rightfully disconcerted by the "tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes" and that the "opportunities for multiple prosecutions for an essential unitary criminal episode are frightening." Ashe, supra at 452. Moreover, he recognized the irony in allowing the Double Jeopardy Clause to be limited to an interpretation which incorporates only the "same evidence" test; under such an interpretation, "criminal defendants would have less protection from multiple trials than civil defendants. This anomaly would be intolerable." Ashe, supra at 457.

The Missouri Supreme Court should be credited with recognizing that what the state did in David Urban's case was to window dress the same offense and pass it off at a second

trial. The Petitioner dislikes this result not because it offends its notion of constitutional law, but because it robbed the state of a conviction. This is not this Court's problem.

Petitioner also complains that Grady is irreconcilable with the recent case of Dowling v. United States, 493 U.S. ___, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). Respondent fails to see how this is so. Dowling did not try the defendant a second time for conduct for which he had previously been convicted; it allowed in evidence a prior bad act - an act which was in no way an element of nor at issue at defendant's second trial; an act which, at the second trial, was subject to a "lower standard of proof," Dowling, 110 S.Ct. at 672; and an act which, at the first trial, had not conclusively been adjudicated. Throwing Dowling into its argument is merely a diversionary tactic: Dowling is not generally at odds with Grady; Dowling is not apposite to the instant case; and any alleged conflict between Dowling and Grady is not reason enough for issuance of a Writ of Certiorari in this matter.

Even assuming that Grady misinterprets the Constitution, Justice Stevens has made a very persuasive argument that the issuance of a Writ of Certiorari is improvident where a state court decision provides greater protection to a citizen than is required by the Constitution. In his dissent in Michigan v. Long, 463 U.S. 1032, 1067-70 (1983), Justice Stevens asserted,

> Even if I agree with the Court that we are free to consider as a fresh proposition whether we may take presumptive jurisdiction over the decisions of sovereign states, I could not agree that an expansive attitude makes good sense. It appears to be common ground that

> any rule we adopt should show "respect for state courts and [a] desire to avoid advisory opinions" ... and I am confident that all members of this Court agree that there is a vital interest in the sound management of scarce federal judicial resources. All of those policies counsel against the exercise of federal jurisdiction. They are fortified by my belief that a policy of judicial restraint - one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene - enables this Court to make its most effective contribution to our federal system of government.
>
> The nature of the case before us hardly compels a departure from tradition. These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather they are cases in which a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and "overprotected the citizen...
>
> Until recently we had virtually no interest in cases of this type...sometime during the past decade...our priorities shifted. The result is a docket swollen with requests by the states to reverse judgments that their courts have rendered in favor of their citizens. I am confident that a future court will recognize the error of this allocation of resources. When that day comes, I think it likely that the Court will also reconsider the propriety of today's expansion of our jurisdiction.

There is simply no compelling nor even arguable basis for certiorari in this case. The Missouri Supreme Court's decision was soundly based in sound federal law.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 90-1134
	)	
DAVID URBAN,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

An original and one copy mailed this 29th day of March, 1991 to the Supreme Court of the United States, One First Street, NE, Washington, D.C. 20543; one copy to the Missouri Supreme Court, Supreme Court Building, P.O. Box 150, Jefferson City, Mo. 65102; and Mr. John Morris, Attorney General's Office, P.O. Box 899, Jefferson City, Mo. 65102.

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